3

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. B. POWER, as Trustee in Bankruptcy of the Estate of Daniel Fuhrman, Bankrupt,

Petitioner,

vs.

RAY FUHRMAN,

Respondent.

No. 2344.

IN THE MATTER OF DANIEL FUHRMAN, BANKRUPT.

UPON REVIEW FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Respondent

E. H. GUIE,
Attorney for Respondent.

810 Leary Building,
Seattle, Wash.

Alaska Printing Co., **Seattle's Brief Printers,** Alaska Bldg. Main 7398

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. B. POWER, as Trustee in Bankruptcy of the Estate of Daniel Fuhrman, Bankrupt,

Petitioner,

vs.

RAY FUHRMAN,

Respondent.

No. 2344.

IN THE MATTER OF DANIEL FUHRMAN, BANKRUPT.

UPON REVIEW FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Respondent

BRIEF OF THE ARGUMENT.

The Referee in Bankruptcy in this proceeding made a finding that the said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, had in their possession and under their control, the sum of $9,000.00 in cash belonging to said estate in bankruptcy, and that the referee was satisfied with the ability of the bankrupt and his wife to then comply with the order of the court.

The legal effect and the effect in fact of this finding is that the marital community, consisting of Daniel Fuhrman and respondent, was the owner and in possession of the fund previous to and at the time the petition to have Daniel Fuhrman adjudged a bankrupt was filed. Not that the wife, *Ray Fuhrman, was in possession of said sum.* This construction is clarified by the finding of the District Court on the contempt hearing, viz.: by Finding of Fact VI (Record, page 17), which is as follows:

"That at the time the said sum of *nine thousand dollars was taken and received by the said Daniel Fuhrman,* which was before the said Daniel Fuhrman was adjudged a bankrupt herein, the said Daniel Fuhrman was the husband of said Ray Fuhrman, and said parties were then and there living together as husband and wife in the City of Seattle, County of King, and State of Washington,

and said sum of nine thousand dollars was the property of the said community composed of said Daniel Fuhrman and Ray Fuhrman under the laws of the State of Washington, and said Daniel Fuhrman, under the laws of said state, had the right to exercise complete possession, control and management of said sum of nine thousand dollars."

Here is a direct finding that Daniel Fuhrman, the husband, and *not* Ray Fuhrman, the *wife,* had said sum.

As Conclusion of Law I the court finds:

"That under and by virtue of the community property law of the State of Washington, the presumption arises, as a matter of law, that the said Ray Fuhrman no longer has in her possession or control the said sum of nine thousand dollars, or any part thereof; but that the same has passed into the legal and actual possession and legal and actual control of said Daniel Fuhrman, her husband, and that this presumption of law is sufficient to overcome the presumption of fact, arising from the finding of the Referee and Court that respondent, Ray Fuhrman, had, with her husband, one of the respondents, Daniel Fuhrman, received and withheld said nine thousand dollars from the trustee in bankruptcy." (Record p. 18.)

Had the Referee found that the wife *individually* had possession of said sum a different question would be presented, but there is no finding by the Referee or in the order of the court confirming the Referee's decision, that *the wife, separate and apart*

from her husband, ever had any personal or *individual control* over the said sum of money or any portion of the same which it is alleged was concealed. The Referee found her to be in *the joint control* of the money by virtue of her marital status and *not otherwise.* The law of the State of Washington, referred to by the court in its Conclusion of Law I (Record p. 18), is set forth in appellant's brief, and is as follows:

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." (*Rem. & Bal. Code,* Sec. 5917.)

The bankrupt had the exclusive management, control and disposition of the community personal property under the community law of the State of Washington. (Finding of Fact VI; Record p. 17.)

First National Bank vs. Fowler, 54 Wash. 65, 70.

12 *Am. & Eng. Ency. Law* (2nd Ed.) 209.

Therefore the finding of the Referee is limited to the community and not to the husband and wife separately.

No case has been cited nor can any be found where a wife has been held liable for the misdeeds of her husband in concealing or disposing of their joint community property in fraud of creditors, and certainly no *contempt* liability should attach in the absence of a clear and specific finding that the wife personally and separately held the money. The cases cited by petitioner in support of his contention to this effect are not in point, viz.:

In re Eddleman, 154 Fed. 160 (D. C.), is a case where the bankrupt, previous to the petition in bankruptcy being filed, handed over to his wife personally the proceeds received by him from the sale of property. The court held that she would be regarded as holding the same as his agent, and that such facts would justify an order requiring the bankrupt to pay the money to his trustee. In this case no proceedings were brought against the wife.

In re Friedman, 153 Fed. 939 (D. C. N. Y.), a shoe dealer sold his entire stock, receiving $3,850 therefor, which was given to his wife. The court found that the wife had the actual separate and individual possession of the money.

In re Moore, 104 Fed. 869, the bankrupt just

prior to the filing of the petition, turned over to his wife certain moneys and property amounting to $300.00 in value which she refused to turn over to the trustee, although admitting the receipt.

No such state of facts exists in the case at bar as are in the several cases cited by petitioner. The only possession and control Ray Fuhrman had, as found by the Referee, was a presumptive possession as a member of the community. This presumption cannot obtain because of the Washington statute above cited vesting in the husband the management and control of community personal property with a like power of disposition as he has of his separate personal property; and it is submitted that no person may be lawfully convicted of contempt *on a community or presumptive possession.* The evidence must show that the person proceeded against, *personally* and free from the control of her husband, has possession of the money or other property.

Aside from the presumption the court by Finding of Fact VI says, in no unmistakable terms, that the money was taken and received by the bankrupt before *he* was adjudged such, and, as stated in Conclusion of Law I, that the same passed into the legal and actual possession and legal and actual control of the bankrupt, and that the respondent did not

have, nor did she ever have, any possession or control of the said sum of money or any portion of the same.

Petitioner cannot in this court complain of Finding VI made by the District Court. The record does not contain the evidence taken by the Referee or the evidence taken on the hearing for contempt and it must be presumed that the facts disclosed by the evidence were sufficient to sustain all the findings as made by the court on the contempt hearing.

In re Baum, 169 Fed. 410 (C. C. A. Ark.), 22 A. B. R. 295.

The District Court found, by Finding of Fact V, (Record p. 17), "That the court is unable to find from the evidence *introduced* that the respondent, Ray Fuhrman, has the present ability or had the ability at the time of said contempt hearing to turn over said sum of money or any part thereof." And this court is bound to assume that the facts, as presented to the court, are ample to sustain said finding.

Section 24b of the Bankrupt Act under which the review is taken reads as follows:

"The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to supperintend and revise in *matter of law* the pro-

ceedings of the several inferior courts of bankruptcy within their jurisdiction. * * * *"

This is confined to questions of law and does not contemplate a review of the facts. This court may only superintend, and if need be, review the lower court's action in the *matter of law.* This is the settled interpretation given section 24b.

Matter of Loring, 224 U. S. 183.

Coder vs. Arts, 213 U. S. 223.

First Nat'l Bank vs. Chicago Title & Trust Co., 198 U. S. 280.

Mueller vs. Nugent, 184 U. S. 1.

Samel vs. Dodd, (Fifth Cir.), 142 Fed. 68.

In re Purvine, (Fifth Cir.), 96 Fed. 192.

II.

The proof which will justify a judgment of the court depriving the contemnor of his or her liberty must be clear and convincing. It must be sufficient to convince beyond a reasonable doubt as in any criminal action. The essential elements of wilful disobedience and present ability to obey must be established by clear and convincing proof before the court can find that the accused person is in contempt.

The District Court must be satisfied beyond a

reasonable doubt that the respondent can comply with its order to be justified in adjudging her guilty of contempt.

Loveland on Bankruptcy, 1240.

Boyd vs. Glucklich, 116 Fed. 131.

In re Felson, 124 Fed. 288.

Ex Parte Comingor, 107 Fed. 898.

In re Alter, 170 Fed. 634.

In re Hausman, 121 Fed. 984.

American Fruit Co. vs. Wallis, 126 Fed. 464, 131 Fed. 643.

In re Sweitzer, 140 Fed. 976.

In re Dawson, 143 Fed. 673.

Samel vs. Dodd, 142 Fed. 68.

Stuart vs. Reynolds, 204 Fed. 709.

"The power to punish for contempt is cautiously exercised."

Remington on Bankruptcy, Vol. II, Sec. 2336, p. 1418.

Defendant must be proved guilty of contempt.

Gompers vs. Buck's Stove & R. Co., 221 U. S. 418.

No court can be so convinced unless the evidence clearly shows that the person proceeded against personally holds the money or property indi-

vidually, especially where the relationship of husband and wife is shown to exist.

In *Samel vs. Dodd,* 142 Fed. 68, the court states, on page 17:

"While bankruptcy courts are invested with power, as we have already shown, to require bankrupts to surrender their property and to enforce obedience to the order by attachment for contempt, yet the power is far-reaching and drastic and should be exercised with cautious discretion. Indeed, it may be said that it should never be exercised, except in a plain case, and always with due regard to the constitutional rights of the citizen. In this immediate connection the apt words of Mr. Justice Bradley may be appropriately employed. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis. Boyd vs. U. S.,* 116 U. S. 635; 29 L. Ed. 746."

And on page 73 of the same decision:

"The bankrupts, in their answers, have sworn that they have not in their possession and control either the money or the goods involved in this proceeding. It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would necessarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee. But, however that may be, the record in the cause, taken as a whole, fails to show that the bankrupts had in their possession at the date of

the order committing them for contempt either the money or the goods referred to. If the bankrupts have sworn falsely in their pleadings or on their examination, and this proceeding is based solely on that hypothesis, the law provides for their punishment or indictment and conviction by a procedure which secures to them the right of trial by jury with all its constitutional safeguards."

In the case at bar the respondent made her sworn answer denying that she had the money or ever had it; denying that she had the possession or control of the same, or that she had the ability to pay the money over to the trustee. And she testified herself and adduced other proof in support of her answer, notwithstanding the statement of counsel for petitioner in his brief that no proof was offered, and this evidence was before the court when its order and findings were made and entered herein.

It was on the testimony *introduced* at the contempt hearing that the court was unable to find that respondent had the ability at the time of said contempt hearing to turn over the money or any part thereof. Before respondent could be committed for contempt the court would have to find, beyond a reasonable doubt, that she had the ability at the time of the hearing to pay over the money.

McNeil vs. McCormack, 182 Fed. 808.

In contempt cases, and especially in those which involve the charge of another criminal offense besides the contempt, the rules of evidence applicable to civil cases in reference to presumption and the shifting of proof do not apply; but the proceedings and the rules of evidence and presumptions of law applied in criminal cases should be observed.

State vs. Matthews, 37 N. H. 450, 454.
United States vs. Wayne, Fed. Cas. No. 16,654.
United States vs. Jose, 63 Fed. 951.
In re Sweitzer, 140 Fed. 976.
Stuart vs. Reynolds, 204 Fed. 712, 715.

Petitioner maintains that the finding of the Referee that the bankrupt and respondent had the money in their possession and control, is conclusive upon the respondent and the court, that from that time on and from the time affirmance of the finding by the court, that the duties of the court were merely formal and ministerial. That upon the trustee filing a petition that the bankrupt or contemnor had failed to obey the order of the court by paying over the money to the trustee, the court is precluded from making any independent investigation, that it is estopped from making any finding of fact which conflicts with the findings already made, and

that the burden is on the contemnor to establish and prove inbality to comply with the Referee's order.

There are two distinct lines of decisions upon this subject. Those cited by appellant, which hold, in substance, that an order of the Referee, made after hearing and supported by evidence, adjudging the bankrupt to have in his possession and control a certain sum of money or specific property belonging to his estate, and requiring him to turn over to the trustee such money or property, which order he neither obeys nor seeks to have reviewed, creates a presumption of the ability of the bankrupt to comply with the order and casts upon him the burden of proving the contrary, and that such presumption becomes final and conclusive unless the bankrupt gives an adequate explanation of what has become of the money or property. These cases are:

In re Frankel (D. C.), 184 Fed. 539.

In re Stravrahn, 174 Fed. 330, 98 C. C. A. 202.

In re Marks (D. C.), 176 Fed. 1018.

In re Richards (D. C.), 183 Fed. 501.

In re Commongs (D. C.), 186 Fed. 1020.

In the other line are the courts which hold in substance that in proceedings against a bankrupt

for contempt for failure to obey an order of the Referee requiring him to turn over money or property to the trustee, such order may be referred to and given the weight to which it is entitled under all the circumstances. But the court should make a new and independent investigation, and should consider all material evidence relating to what preceded as well as to what followed the Referee's report, and from such investigation and principally from such evidence, determine whether or not the bankrupt has the present ability to comply with such order. The authorities that lay down this principle are:

In re Davison (D. C.), 143 Fed. 673.
In re Goodrich, 186 Fed. 5, 106 C. C. A. 207.
In re Cole, 163 Fed. 180, 90 C. C. A. 50.
Samel vs. Dodd, 142 Fed. 68, 73 C. C. A. 254.
Stuart vs. Reynolds, 204 Fed. 712, 715.

The weight of authority supports the last principle. The question has never been passed upon by this court.

When the court is called upon by the zealous representative of the creditors, to imprison an alleged contemnor, the petitioner charging the contempt should be required to prove his allegations

of contempt beyond a reasonable doubt. Examinations of a bankrupt are usually had as soon as he can be haled before the Referee. The excited and anxious creditors, the trustee and his attorney desiring to get hold of all the property possible for the benefit of the creditors and incidently increasing their own fees, regard the bankrupt and his statements and testimony with suspicion. Nothing is resolved in his favor.

In view of the above Findings of Fact V and VI, which are plain and unambiguous, and which were made by the court based on evidence *introduced* on the contempt hearing, to the effect that the respondent did not have the ability at the time of the contempt hearing, or at the time of the making and filing of the Finding of Fact, to turn over said money, or any part of the same, and to the effect that the money had been received by Daniel Fuhrman previous to his being adjudged a bankrupt, and which the court finds it was under his separate control and management, there is nothing before this court for consideration.

We respectfully submit that the judgment of the District Court should be affirmed.

E. H. GUIE,
Attorney for Respondent.